QUILL CONSTRUCTION SDN BHD

v.

TAN HOR TENG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S1-24-331-95]
11 APRIL 2003

LAND LAW: *Restraints on dealings - Caveat - Claim for compensation for wrongful caveat under s. 329 (1), National Land Code 1965 - Applicability of Court of Appeal decision in Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor - Effect of private caveat - Frustration of all financial arrangements - Computation of losses - Action for damages under s. 329(1) National Land Code 1965 - Which party to be sued*

WORDS & PHRASES: *'wrongfully or without reasonable cause' - Section 329(1), National Land Code 1965 - Whether 'wrongfully' and 'without reasonable cause' ought to be read disjunctively - Whether party could succeed if could be shown private caveat had been lodged 'wrongfully' - 'Wrongfully' - Meaning of - Whether referred to not only malicious but negligent entry of caveat*

LAND LAW: *Sale of land - Caveat - Whether under s. 329(1), National Land Code 1965, 'any person who thereby suffers any damage or loss' can make claim for compensation - Whether only confined to person who applied for removal of private caveat*

This was the defendants' appeal in encl. 32 against the decision of the senior assistant registrar ('SAR') who had allowed the plaintiff's application by way of encl. 25. Essentially, the plaintiff sought against the defendants in encl. 25 for losses and damages sustained as a result of a private caveat which the defendants lodged on the land wherein a property/shophouse stood. Briefly stated, the defendants were tenants of the shophouse in pursuance of a tenancy agreement with one Luggage Distributors (M) Sdn. Bhd. ('Luggage'). Apparently, the plaintiff had filed encl. 25 in reliance of the decision of the Court of Appeal in the case of *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor* in which it was decided that the defendants had no caveatable interest in the land at the material time.

Held:

[1] The plaintiff had fashioned its claim against the defendants under s. 329(1) of the National Land Code 1965 ('NLC'). There are two limbs in s. 329(1) of the NLC that the plaintiff had to satisfy; *ie*, (i) that the private caveat entered by the defendants was entered wrongfully or without reasonable cause; and (ii) that the plaintiff suffered damages or losses as a result of the lodgment of the private caveat. (p 33 c-d & g)

[2] Since in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor (supra)* it was decided that the private caveat lodged by the present defendants was wrongful and that it was ordered to be removed, thus in the present case the fact that the private caveat was wrongfully entered was not disputed. (p 33 h)

[2a] Section 329(1) of the NLC creates a right of action in a situation where there is malicious, negligent and incorrect entry of a private caveat or a failure to withdraw a private caveat. Thus, by virtue of s. 329(1) of the NLC, an action against any person or body for lodging the private caveat 'wrongfully or without reasonable cause' would be in a situation where the entry of such private caveat or the failure to withdraw such private caveat did result in actual damage. In this instance, the private caveat had 'frustrated all financial arrangements' that arose when Luggage sold the shophouse and its land thereto to the plaintiff. The loss incurred would also cover expenses which the registered proprietor would incur in seeking the removal of the private caveat. (pp 37 b-c, d & f)

[3] An action under s. 329(1) of the NLC would not lie against the registrar. The registrar has no discretion under the law as to whether a private caveat ought to be entered where the application is in a statutory form and discloses an interest capable of being caveated as set out in s. 324 of the NLC. Any action for damages under s. 329(1) of the NLC would lie against the caveators. (pp 37 h & 38 a)

[4] Section 329(1) of the NLC employs the words 'wrongfully or without reasonable cause'. The term 'wrongfully' would refer to not only a malicious but also negligent entry of a caveat. (p 38 c)

[5] Under s. 329(1) of the NLC, it was sufficient for the plaintiff to show that the defendants when filing their private caveat had 'wrongfully' done so. The word 'or' in the phrase 'wrongfully or without reasonable cause' used in s. 329(1) of the NLC suggests that the requirements of 'wrongfully' and 'without reasonable cause' ought to be read disjunctively. Using this approach, the plaintiff was entitled to succeed if it could show that the defendants' private caveat had been lodged 'wrongfully'. There was no necessity for the plaintiff to show that the private caveat was lodged by the defendants 'without reasonable cause'. (p 44 d-f)

[6] Although the present plaintiff was not a party in *Luggage Distributors (M) Sdn. Bhd. (supra)*, however, under s. 329(1) of the NLC, 'any person who thereby suffers any damage or loss' can make a claim for compensation. It is not confined to the person who applied for the removal of the private caveat. In this instance, it was Luggage who sought for the removal of the private caveat lodged by the defendants. The present plaintiff took advantage of it and proceeded against the defendants. The plaintiff was entitled to do that. (p 45 c-d & e)

[Appeal dismissed.]

Case(s) referred to:

Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd (No 2) [1966] 2 All ER 536 HL ***(refd)***

Cheng Chin Chong v. Shak Heng & Sons Sdn Bhd [1981] CLJ 91; [1981] CLJ (Rep) 126 HC ***(refd)***

Commonwealth Bank of Australia v. Baranyay [1993] 1 VR 589 ***(refd)***

Highceed Corp Sdn Bhd v. Warisan Harta Sabah Sdn Bhd & Anor [2000] 5 MLJ 337 HC ***(refd)***

Inter-Continental Mining Co Sdn Bhd v. Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145 ***(dist)***

J Raju M Kerpaya v. Kwong Yik Bank Bhd & Anor [1994] 2 CLJ 695 SC ***(dist)***

Lachaume v. Broughton [1903] 3 SR (NSW) 475 ***(refd)***

Lo Foi v. Lee Ah Hong [1997] MLJU 310 ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 CA ***(foll)***

Mawar Biru Sdn Bhd v. Lim Kai Chew [1992] 1 MLJ 336 HC ***(refd)***

New Brunswick Rail Co v. British and French Trust Corporation Ltd [1939] AC 1 HL ***(refd)***

R v. Surrey Quarter Sessions, ex p Commissioner of Metropolitan Police [1963] 1 QB 990 ***(refd)***

Sweney v. The Department of Highways [1933] OWN 783 ***(refd)***

Tan Soo Leng David v. Wee, Saktu & Kumar Pte Ltd & Anor [1993] 3 SLR 569 ***(refd)***
Than Kok Leong v. Low Kim Hai [1983] 1 CLJ 95; [1983] CLJ (Rep) 907 HC ***(refd)***
Uddin v. Associated Portland Cement Manufacturers Ltd [1965] 2 QB 582 ***(refd)***
Yeo Hiap Seng v. Australian Food Corp Pte Ltd & Anor [1991] 3 MLJ 144 HC ***(refd)***
Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi Mookan & Anor (Dekor Panel Emas Sdn Bhd, Intervener) [1994] 3 CLJ 265 HC ***(refd)***
Young v. Rydalmere Credits Pty Ltd [1964-1965] NSWR 1001 ***(refd)***

Legislation referred to:
National Land Code, ss. 206(3), 316(1), 324, 327, 329(1)
Rules of the High Court 1980, O. 14

Australian Transfer of Land Act 1958, s. 118
Land Titles Act [Sing], s. 112(1)

Other source(s) referred to:
Benjamin N Cardozo, *The Nature of the Judicial Process,* New Haven and London: Yale University Press 1921, pp 9-50
Herbert Brown LLD, *A Selection Of Legal Maxims Classified and Illustrated,* p 198
Rt Hon Lord Denning, *The Discipline of the Law*, London: Butterworths 1979, pp 285-314
Weiler, *Legal Values and Judicial Decision Making,* 1970, 48 Can Bar Rev 1

For the plaintiff - Ong Chee Kwan; M/s Lee Ong & Kandiah
For the defendants - Balbir Singh; M/s KY Thong & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

Luggage Distributors (M) Sdn Bhd (hereinafter referred to as "Luggage") is the registered proprietor of a three storey shophouse at No: 12, Jalan Telawi Dua, Bangsar Baru (hereinafter referred to as the "shophouse") held under Geran No: 890, Lot No: 22592 in the District of Kuala Lumpur (hereinafter referred to as the "land"). That is the most sought after address in Kuala Lumpur. The defendants were desirous of renting the ground floor of the shophouse and so, on 8 July 1993, the defendants entered into a tenancy agreement with Luggage for a period of two (2) years and with an option for a further period of two (2) years as reflected in exh. "T4" of encl. 11 at p. 81 thereto.

On 24 November 1993, Luggage entered into a sale and purchase agreement with Quill Construction Sdn Bhd – the present plaintiff, wherein Luggage sold the whole shophouse and the land thereto to the plaintiff. The sale and purchase agreement can be seen in exh. "T4" of encl. 11 at p. 59 to p. 66 thereof. It was an express term that the sale was subject to, *inter alia*, the defendants' tenancy and as such without vacant possession. Recital "E" of that sale and purchase agreement states as follows:

> The said property is tenanted to various tenants under their respective tenancy agreement(s) and particulars whereof have been rendered to the purchaser.

Concisely put, the sale and purchase agreement gives rise to, *inter alia*, the following obligations:

(1) the vendor – referring to Luggage, is under an obligation to deliver legal title;

(2) the sale was subject to the tenancy entered into between Luggage and the defendants;

(3) that upon payment of the full purchase price, the purchaser – referring to the present plaintiff, would receive legal possession of the land wherein the shophouse is located; and

(4) that the purchaser – referring to the present plaintiff, was entitled to specific performance only if it abided by the terms and conditions of the sale and purchase agreement.

For the sake of convenience and expediency, I shall henceforth refer to the "shophouse" and the "land" as the "property". I must also mention that when the present plaintiff entered into that sale and purchase agreement to buy that property from Luggage, the present plaintiff was represented by Messrs. Darshan Chong & Co while Luggage was represented by Messrs. Lee Ong & Kandiah. On the other hand, the defendants were and are still being represented by Messrs. KY Thong & Co. Now, the present plaintiff is currently being represented by Messrs. Lee Ong & Kandiah.

No notice of the sale of the property was given by either Luggage or the present plaintiff to the defendants. The defendants were left entirely in the dark.

On 22 November 1993, Madam Low Moi Ing (hereinafter referred to as "Low"), the director of the present plaintiff, filed a private caveat on the said property. Fortunately, the defendants conducted a search at the land office and discovered the existence of that private caveat that was lodged by Low. The

defendants wrote to Low – the caveator, "seeking comfort that their interest was not impaired or affected by the caveat." The present plaintiff through its solicitors Messrs. Darshan, Chong & Co by letter dated 22 December 1993 relayed the message to the defendants to the effect that the present plaintiff had entered into a sale and purchase agreement with Luggage and that the present plaintiff intended to take possession of the said property once the sale was completed.

The defendants exploited and used the letter dated 22 December 1993 as alluded to above to its own advantage. The defendants say that by that letter the present plaintiff was in breach of its contract with Luggage which contract stipulated that the sale of the property was subject to the tenancies and that the present plaintiff would only acquire legal possession and not vacant possession. The defendants also say that by this letter the present plaintiff had committed two tortious acts, namely:

(a) unlawful interference in the contract between Luggage and the defendants; and

(b) unlawful interference in the business of the defendants and their quiet occupation of the ground floor of the shophouse.

On 4 January 1994, the defendants then exercised their option to renew the tenancy agreement thus extending the period of the tenancy to exceed three (3) years and that tenancy would expire on 31 August 1997. In so doing, the defendants were under a belief that they had in accordance with the law in 1994 that the tenancy which they had entered would accord them a registrable interest. So, on 12 January 1994, the defendants filed a private caveat on the property. Events have since proved that that belief was entirely wrong.

Facts Of The Case

The present plaintiff applied and obtained summary judgment against the defendants on 2 December 1999 for damages to be assessed with interest at 8% per annum as per encl. 25. The application was based on the now famous Court of Appeal decision in the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713. The coram for the Court of Appeal constituted of Gopal Sri Ram, VC George and Abu Mansor JJCA. It was a strong panel of the Court of Appeal. It was a unanimous decision of the Court of Appeal who allowed the appeal and gave "certain consequential orders."

The Court of Appeal ruled that it was a simple and straight forward case that the private caveat lodged by the defendants was wrongful and that the same was ordered to be removed. At p. 747 of the report of the judgment of the Court of Appeal, Gopal Sri Ram JCA aptly said:

> **CONCLUSION**
>
> For the reasons that I have given in this judgment, the respondent (referring to the present defendants) had no caveatable interest in the land at the material time. To repeat, all that they had was an exempted tenancy for two years with an option to have it renewed for a further two years. It is an interest that is only capable of protection by endorsement. No such endorsement was made. There is, therefore, absolutely no basis on which the caveat could be allowed to remain.
>
> Accordingly, this court directed that the caveat be removed forthwith and made an order in terms of the appellant's (referring to Luggage's) originating summons. The appellant (referring to Luggage) was given its costs here and in the court below. The deposit was ordered to be refunded to the appellant (referring to Luggage).

There was no appeal against the decision of the Court of Appeal.

I am certainly bound by the decision of the Court of Appeal. The doctrine of precedent or *stare decisis* (to abide by precedents) have always been foremost in my mind. The doctrine is always justified by the following arguments: the need to have stability and certainty in the law and the notions of justice and fairness (see the *Rt. Hon. Lord Denning, The Discipline of the Law* (London: Butterworths, 1979) at p. 285 to p. 314; Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven and London: Yale University Press, 1921) at p. 9 to p. 50; and Weiler, *"Legal Values and Judicial Decision Making"* (1970) 48 Can. Bar Rev. 1).

According to Benjamin N. Cardozo in his treatise, *"The Nature of the Judicial Process"* at p. 33 to p. 34 that adherence to precedent must be the rule rather than the exception especially if litigants are to have faith in the even handed administration of justice in the courts. Middleton J.A. speaking for the Ontario Court of Appeal in the case of *Sweney v. The Department of Highways* [1933] OWN 783 (CA), at p. 783 to p. 784 aptly said:

> But, in my view, liberty to decide each case as you think right, without regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what Judge his case would come and could guess what view the Judge would take on a consideration of the matter, without any regard to previous decisions.

The doctrine of *stare decisis* can rightly be said to be a doctrine that is related to justice and fairness. It simply will not do if the courts were to decide the same question one way between one set of litigants and the other and opposite way between another set of litigants. To decide differently on the same question would raise feeling of resentment and if that happens, it is wrong in law and it should not be condoned. All judges must be presumed to know this.

Reverting back to the main stream of the case, it must be recalled that the present plaintiff was the purchaser of the said property in question. And the vendor was none other than Luggage. It was by reason of the wrongful private caveat that was lodged by the defendants that the sale and purchase agreement could not proceed ahead because the present plaintiff's financier would not allow any draw down unless and until the private caveat that was lodged by the defendants was withdrawn. Indeed, this fact was recognised by the Court of Appeal in the case of *Luggage Distributors (M) Sdn Bhd (supra)*. At p. 720 of the report of that case, Gopal Sri Ram JCA observed:

> It is clear from these recitals that the property was being sold without vacant possession and that financing for its purchase was contemplated. The importance of the former rests on the proposition that Quill's (referring to the present plaintiff) was bound by the tenancy agreement, whilst the latter demonstrates that an innocent third party, namely, a financier, would in all probability seek a charge of the title to the land as security for the intended loan. The existence of any caveat would, of course, frustrate all financing arrangements.

The present plaintiff had to act expeditiously. In order to avoid having the initial deposit to be forfeited by Luggage, the present plaintiff agreed with Luggage to seek for more time and also agreed to pay interests for the delay and to bear the legal costs which Luggage would incur in applying to the court to remove the caveat that was lodged by the defendants. The affidavit of Low that was affirmed on 18 May 1995 as seen in encl. 2 makes for an interesting reading material – especially paras. 15 and 16 thereto. I will now reproduce those two paragraphs in quick succession:

15. The plaintiff in order not to lose their 10% deposit for not being able to complete the Agreement, agreed with Luggage Distributors to pay interests on the balance sum of RM1,530,000.00 at the rate of 10% per annum from 24.2.1994 up to (and) including the date of full payment of the purchase price. In order to (do) this, the plaintiff had to resort to an alternative form of financing using its overdraft facility.

16. The plaintiff was further required to bear the legal costs incurred by Luggage Distributors in taking legal proceeding against the defendants to remove the private caveat including any costs of appeal. Annexed hereto and marked 'F' is a true copy of M/S Lee Ong & Kandiah's letter dated 19.8.1994 setting out the terms of this arrangement.

Nature Of The Appeal

In this judgment, I am concerned with encl. 32 only. Now, encl. 32 was an appeal to the judge in chambers filed by the defendants against the decision of the learned senior assistant registrar ("SAR") dated 12 February 1999 wherein the learned SAR allowed the plaintiff's application dated 4 March 1994 under O. 14 of the Rules of the High Court 1980 ("RHC") and the plaintiff's application can be seen in encl. 25.

By way of encl. 25, the plaintiff sought for the following prayers:

(1) Defendan-Defendan membayar Plaintif jumlah sebanyak RM222,548.46 atau sebaliknya kerugian yang akan ditaksirkan.

(2) Faedah pada kadar 8% setahun di atas RM222,548.46 atau jumlah seumpamanya yang didapati perlu dibayar dari Defendan-Defendan kepada Plaintif dari tarikh 18hb Mei 1995 sehingga tarikh penyelesaian sepenuhnya.

(3) Kos.

Briefly, the plaintiff sought in encl. 25 the sum of RM222,548.46 to be paid by the defendants or that the defendants were to pay losses incurred by the plaintiff and these losses were to be assessed. The plaintiff too sought by way of encl. 25 interest at the rate of 8% per annum on the sum of RM222,548.46 or such sums which the defendants ought to pay the plaintiff from 18 May 1995 until the date of full realisation. The plaintiff also craved for costs.

Having heard encl. 25, the learned SAR allowed it forthwith and hence the present appeal in encl. 32.

It is apparent that the plaintiff filed encl. 25 in total reliance of the decision of the Court of Appeal in the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor (supra)*. Essentially, the plaintiff sought against the defendants in encl. 25 for the actual loss and the damages sustained as a result of the private caveat which the defendants lodged on the land wherein the shophouse stood. The Court of Appeal had ruled that the defendants had no caveatable interest in the land, at all, at the material time.

The Appeal By The Defendants In Enclosure 32 Against The Interlocutory Judgment Which The Plaintiff Obtained In Enclosure 25 Before The Learned SAR

The plaintiff fashioned its claim against the defendants under s. 329(1) of the National Land Code 1965 ("NLC") which enacts as follows:

> **Compensation for wrongful caveats, and limitation on repeated applications.**
>
> 329(1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

And according to the late Yusof Abdul Rashid J in the case of *Cheng Chin Chong v. Shak Heng & Sons Sdn. Bhd.* [1981] CLJ 91; [1981] CLJ (Rep) 126:

> To succeed in claiming compensation against the plaintiff under section 329(1) of the Code, the defendants have to prove that the plaintiff had secured the entry of the caveat wrongfully or without reasonable cause and that due to such wrongful entry the defendants had suffered damages or loss.

So, it can be surmised that there are two limbs in s. 329(1) of the NLC that the plaintiff has to satisfy:

(a) that the private caveat entered by the defendants was entered wrongfully or without reasonable cause: and

(b) that the plaintiff had suffered damages or losses as a result of the lodgment of the private caveat.

Given the decision of the Court of Appeal in the *Luggage Distributor*'s case *(supra)*, the fact that the private caveat was wrongfully entered can no longer be disputed. In fact, by seeking to re-open the issue, the defendants were flagrantly circumventing the *res judicata* doctrine. It must be borne in mind that the defendants did not appeal against the decision of the Court of Appeal.

In regard to the doctrine of *res judicata*, I have this to say.

A final judicial decision has been pronounced by the Court of Appeal – a judicial tribunal of competent jurisdiction, over the parties and any other person is estopped in any subsequent litigation from disputing or questioning such decision on the merits (*Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd, (No 2)* [1966] 2 All ER 536, HL). The latin maxim appropriate for the occasion would be *res judicata pro veritate accipitur*. To me, there must be finality and conclusiveness of judicial decisions. There must also be individual protection from vexatious multiplication of suits involving the same parties with the same facts. In the words of Lord Maugham LC in *New Brunswick Rail. Co. v. British and French Trust Corporation, Ltd* [1939] AC 1, HL, at p. 19 to p. 20:

> If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

Here, the case had gone through the whole rigmarole. It was heard by NH Chan J (as he then was) and it was then heard on its merits before the Court of Appeal where the parties were represented by counsel. The Court of Appeal in a long and interesting judgment had ploughed through the facts and the submissions of the parties, so to speak, at great length. It was a speaking judgment par excellence. And of pertinence would be this. The parties were happy with the decision of the Court of Appeal because there was no appeal to the Federal Court – our apex court.

So much for the brief digression.

Proceeding across the causeway there is a case known as *Tan Soo Leng David v. Wee, Saktu & Kumar Pte Ltd & Anor* [1993] 3 SLR 569. There the court had to construe s. 112(1) of the Land Titles Act (Cap 157) and GP Selvam JC had this to say at p. 576 to p. 577 of the report:

Compensation for improper lodging of caveat.

> Section 112(1) affords compensation to the caveatee upon proof of loss and that the caveat was entered 'wrongfully or vexatiously or without reasonable cause'.

> Where civil process of the court or similar remedy is abused by improperly preventing the opponent from dealing with his property before his liability is established, English law does not afford a coherent remedy to the person who is injured by the improper use of such pre-judgment remedy. The common

law gave no pre-judgment remedy and therefore there was no possibility of the defendants being injured. The admiralty court gives damages for wrongful arrest but not in the absence of malice. But in equity it is well established that where a plaintiff obtains an interlocutory injunction but fails to sustain it to a judgment in his favour, he will, except in special circumstances, be liable to the defendant in damages. It is not necessary to prove malice, vexation or lack of good faith. If, therefore, Lord Diplock's analogy between an interlocutory injunction and a private caveat is taken to its logical end, a court setting aside a caveat, in principle should order an inquiry into damages as a necessary consequence of doing so.

In *Virginia Developments v. Behem Investments* [1988] 2 MLJ 273, there existed a contract for the sale and purchase of property. The purchaser failed to pay the 5% balance of the 10% deposit within the stipulated time periods and purported to rescind and repudiated the contract but lodged a caveat on the footing that he had a purchaser's lien. Chao Hick Tin J held that from the date the purchaser himself repudiated the contract, he no longer could maintain the caveat as he no longer had any interest as a purchaser. Chao Hick Tin J then ordered that the purchaser pay the vendor for any loss or damage for wrongful retention of the caveat. The decision though based on s. 112 is consistent with the practice of the courts of equity. And the word 'wrongfully' should be construed in this context.

It was contended for the plaintiff that a claim under s. 112 of the Act was analogous to an action for malicious prosecution. This was the view taken by Baalman in *The Singapore Torrens System* (1961) and the Australian courts. In *Becca Developments Pty Ltd v. Idameneo (No 92) Pty Ltd* [1990] 21 NSWLR 459 the majority of the Court of Appeal of New South Wales held that in order to obtain compensation under the similar Australian section, it was necessary to prove that the caveator did not have an honest belief that he had reasonable grounds for lodging the caveat. In *Dykstra & Anor v. Dykstra* [1991] 22 NSWLR 556 McLelland J considered himself bound by the decision of the higher court in *Becca Developments* [1990] 21 NSWLR 459.

However, s. 112(1) of the Act is not an exact replica of the Australian section. In particular, in the Australian section, the words 'wrongfully' and 'without reasonable cause' are used conjunctively rather than disjunctively. Further, lack of good faith, that is lack of honest belief, in lodging a caveat is an independent ground for liability in damages. This made a fundamental difference in the approach of the judges. Clarke JA who delivered the main judgment said, at p. 469:

> It seems clear to me, however, that the legislature intended that the claimant for compensation should satisfy two tests. That is that he should prove that the caveat was lodged without reasonable cause and as well that it was lodged wrongfully. To adopt any other view would be simply to deny the deliberate inclusion of the additional word in an amendment to the Act … .

It is with this in mind he further states at p. 474:

> To lodge a caveat prohibiting the recording of dealings in the land of another obviously infringes the rights of the other. If the person who lodges the caveat has a caveatable interest then he acts in accordance with a statutory right and his conduct could not be described as wrongful. If he does not do so when he has no caveatable interest then, *insofar as he has no right to lodge the caveat, it could be said that his conduct was wrongful. But I do not think that could be its meaning in the context of s. 74P*. The word *was added to the section in order to impose a second pre-condition* to an entitlement to compensation. The first, as I early pointed out, requires proof that the caveator neither had a caveatable interest nor an honest belief based on reasonable grounds that he enjoyed such an interest. *In this context* no additional condition or entitlement to compensation would be added to the section if wrongfully is construed simply to mean without a caveatable interest. (emphasis added.)

In the opinion of Clarke JA the phrase 'wrongfully and without reasonable cause' meant 'without honest belief, or with ulterior motive'. This was also evident from the judgment of Kirby JA who states at p. 462:

> The want of a lawful caveatable interest would normally be embraced by the expression 'without reasonable cause'. Therefore, by taking the trouble to add the new qualifying adverb 'wrongfully', Parliament must be taken to have intended to conserve the compensation provided for cases where the court concluded that the caveator had engaged in some deliberate wrong-doing.

The Singapore Act uses the two phrases disjunctively and non conjunctively. This should mean that the word 'wrongfully' ought to be taken on its own and construed to mean 'without legal right'. That would suffice to hold that the plaintiff is liable in damages to the plaintiff. The use of the other expressions 'without reasonable cause' and 'vexatious' to some extent is tautologous and it is unnecessary to consider them separately.

Our s. 329(1) of the NLC employs the words "wrongfully or without reasonable cause" whereas the Singapore's Land Titles Act (Cap 157) uses the words "wrongfully or vexatiously or without reasonable cause." The court in *Tan Soo Leng David v. Wee, Saktu & Kumar Pte Ltd & Anor (supra)* concluded that the "word 'wrongfully' ought to be taken on its own and construed to mean 'without legal right'." In my view, s. 329(1) of the NLC creates a right of action where there is a malicious or a negligent and incorrect entry of a private caveat or a failure to withdraw a private caveat. But of course, the best view to adopt in construing s. 329(1) of the NLC is this. That an action against any person or body for lodging the private caveat "wrongfully or without reasonable cause" would be in a situation where the entry of such private caveat or the failure to withdraw such private caveat would result in actual damage. Owen J in *Lachaume v. Broughton* [1903] 3 SR (NSW) 475, at p. 480 aptly said:

> The gist of the action is not the maliciously and falsely setting up a title to property, but the damages that may arise from it.

The loss can be readily appreciated where by the presence of the private caveat, the sale of the land would be inhibited or where the sale price of the land would be less than it would otherwise have been received. Here, in the context of our case, the private caveat had in the words of Gopal Sri Ram JCA in *Luggage Distributors (M) Sdn Bhd (supra)* "frustrate all financing arrangements". The loss incurred would also cover expenses which the registered proprietor would incur in seeking the removal of the private caveat under the terms of s. 327 of the NLC. Under and according to our set of facts, the plaintiff had suffered losses and damages in that the plaintiff in order to avoid Luggage from forfeiting the 10% initial payment of the purchase price under the sale and purchase agreement, the plaintiff had agreed to bear any legal costs incurred by Luggage in removing the private caveat and in consideration thereof Luggage agreed to extend time for the plaintiff to complete the sale and purchase agreement. In addition to that, the plaintiff had also incurred additional losses arising from the delay in the completion of the sale and purchase agreement and these losses were itemised at RM222,548.46.

In my judgment, an action under s. 329(1) of the NLC cannot lie against the registrar. The registrar is totally blameless. The registrar has no discretion under the law as to whether or not he will enter a private caveat where the application is in a statutory form and discloses an interest capable of being caveated as set out in s. 324 of the NLC. It is in this sense that an action cannot be taken against the registrar where he has entered such a private caveat.

It is part and parcel of my judgment that an action for damages under s. 329(1) of the NLC shall lie against the defendants – the caveators. Normally it is the registered proprietor who may institute this action. Here, the facts herein would entitle the plaintiff to take this action against the defendants. In other words, any person or body taking an interest from the registered proprietor just like the present plaintiff and who has suffered loss by the entry of, or refusal to withdraw the private caveat is entitled to initiate the action. I cannot help but notice that the term "wrongfully or without reasonable cause" is not defined in the NLC. In my judgment, the term "wrongfully" refers to not only malicious but also negligent entry. It must be noted that although a negligent entry may not cause loss but if it does cause a loss then an action will lie in the same way as would an action for malicious entry or for refusal to withdraw which would eventually occasion a loss. Macfarlan J in *Young v. Rydalmere Credits Pty. Ltd* [1964-1965] NSWR 1001, was of the view that the term "without reasonable cause":

> ... consists of (three) words and whether the words are considered separately or together their meaning is, I think, well understood by lawyer and layman, alike. Whether there has been an absence of reasonable cause requires, I think, a consideration of the circumstances existing both before and at the time when the caveat was lodged.

Shankar J (as he then was) in *Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi s/o Mookan & Anor (Dekor Panel Emas Sdn Bhd, Intervener)* [1994] 3 CLJ 265 at 273 suggested that in order to discourage caveats being lodged with impunity, it should be considered whether caveators should be made to give an undertaking as to damages, fortified with a collateral if need be, where the caveat is being extended until the final disposal of the suit. That was certainly an interesting suggestion and perhaps our apex court would sanction it in the near future.

It is always useful to remember that in the assessment of damages for the wrongful entry of a private caveat, the court must always be vigilant and must ensure that no award for damages will be made unless and until the aggrieved party has proved actual loss. In this context, the plaintiff has to prove the actual loss occasioned by the entry of the private caveat by the defendants. It must be recalled to mind that the Court of Appeal in *Luggage Distributors (M) Sdn Bhd (supra)* held that the defendants had no legal right to enter the private caveat and flowing from that I must hold and it is part and parcel of my judgment that the private caveat was "wrongfully" entered. It is also my judgment that the plaintiff needs only to satisfy me that it suffers damage or loss by reason of the entry of the wrongful caveat. In short, the plaintiff has

to prove that it is an aggrieved party. Here, the plaintiff was the purchaser of the property under the sale and purchase agreement and there was undue delay by reason of the private caveat lodged by the defendants. By reason of that very caveat, it necessitated applications to be made to the courts for its removal before the sale and purchase agreement could proceed ahead. This is acknowledged by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd (supra)* when it said at p. 720 of the report that, "The existence of any caveat would, of course, frustrate all financing arrangements." It goes without saying that the plaintiff has suffered loss and/or damages by reason of the existence of that private caveat. This was my judgment and I so hold accordingly.

Arguments Advanced By The Defendants

Going on an uphill task, the defendants raised several issues in an attempt to show "triable issues". I will now allude to them in quick succession.

(a) That the private caveat was entered "with reasonable cause"

Mr. Balbir Singh, the learned counsel for both the defendants, submitted at great length on the matter. He submitted that the defendants had reasonable cause when they filed the private caveat. Mr. Balbir Singh then went into the history of the case. He was quite meticulous. He pointed out that Luggage had initially filed an application to remove the private caveat lodged by the defendants as seen in originating summons no: S3-24-127-94. He then emphasised that NH Chan J (as he then was) heard and dismissed the originating summons forthwith. According to him, NH Chan J (as he then was) felt bound by the then Federal Court case of *Inter-Continental Mining Co. Sdn Bhd v. Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145 where Gill FJ applied s. 206(3) of the NLC which reads as follows:

> Nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

and granted a caveatable interest to a mere contractual licence which in his Lordship's own words, "The agreement certainly does not create a tenancy or lease but it must surely rank as a contractual licence" (see p. 147 of the report). Mr. Balbir Singh then continued to submit. He pointed out that on appeal, the Court of Appeal reversed the decision of NH Chan J (as he then was) and ordered the removal of the private caveat and damages to be assessed and to be paid by the defendants with costs. But he pointed out that the plaintiff has never acknowledged or agreed that the defendants have a right as tenants to possession of the shophouse. He too said that Luggage as the landlord has never invoked the provisions under the sale and purchase agreement to demand that the plaintiff abide by the sale and purchase agreement. He submitted that as a matter of fact, in strictly construing the sale and purchase agreement, when

the plaintiff paid the purchase price in full then the plaintiff had satisfied the provisions of the sale and purchase agreement and received legal possession thereto. He submitted that the facts in this case was unique. Here, he said, the plaintiff not only funded Luggage's litigation against the defendants as tenants but also paid interest on the outstanding purchase price and any legal costs, etc, as claimed in para. 9 of the statement of claim. And according to him this would only happen because the plaintiff was in breach of its contractual obligations and was unable to claim specific performance against Luggage as the landlord and proprietor of the property. According to him, the triable issues that arose would be framed in this way: how this state of affairs came about?, whether there was fraud or abuse of legal process by the plaintiff or the landlord (Luggage) in seeking damages arising from the decision of the Court of Appeal in the case of *Luggage Distributors (M) Sdn Bhd (supra)*?, and whether the purported loss was a sham and a fraud on the defendants? And all these, according to him, require discoveries, interrogatories and cross-examinations of the key players in this case, namely, the landlord's (referring to Luggage's) directors, agents and employees together with the plaintiff's directors, agents and employees and their respective legal advisers. What is apparent, according to Mr. Balbir Singh, would be this. That the plaintiff:

(a) had unlawfully interfered with the defendants' tenancy of the property;

(b) had interfered with the business enterprise of the defendants;

(c) had breached the terms of the sale and purchase agreement;

(d) had entered into a champertous agreement with the landlord – Luggage;

(e) had otherwise unlawfully maintained an action through the landlord – Luggage, against the defendants; and

(f) had together with the landlord – Luggage, conspired to try to remove the defendants from the property in breach of both parties legal obligations.

Mr. Balbir Singh submitted further. He said that but for the unlawful acts of the plaintiff the defendants would not have attempted to seek a registrable lease of the said property. He said that the plaintiff's claim in essence was nothing more than an attempt to recover losses caused by its own wrongdoing or its own inequity. He too said that by reason of the plaintiff denying the defendants their right to stay at the property by virtue of the tenancy agreement which was the root cause of all the problems that arose thereafter, can the plaintiff now seek damages for such acts which arose from its own wrongdoing? This was the question which he posed to this court. He vigorously submitted that

the plaintiff cannot found a claim on its own breach of contract or tortious acts. He relied on the latin maxim, *"Nullis Commodum Capore Potest De Injuria Sua Propria"* which means "no man shall take advantage of his own wrong". He submitted that this latin maxim found favour in a court of law and equity. He then cited a book entitled, "*A Selection Of Legal Maxims Classified and Illustrated* by Herbert Brown, LLD," and there the learned author said at p. 198:

> Further, we may remark that the maxim which precludes a man from taking advantage of his own wrong is, in principle, closely allied to the maxim, *ex dolo malo non oritur actio*, which is likewise of general application, and will be treated of hereafter in Chapter IX. The latter maxim is, indeed, included in that above noticed; for it is clear, that since a man cannot be permitted to take advantage of his own wrong, he will not be allowed to found a claim upon his own iniquity: *nemo ex proprio dolo consequitur actionem*; and, as before observed, *frustra legis auxilium qucerit qui in legem committit.*

Mr. Balbir Singh then submitted that the defendants believed that they had reasonable cause when the private caveat was filed. He cited the case of *J. Raju M. Kerpaya v. Kwong Yik Bank Berhad & Anor* [1994] 2 CLJ 695, SC, and he relied on the judgment of Wan Yahya bin Pawan Teh SCJ at p. 698 thereof, where his Lordship said:

> However in various recent cases the Courts have given the section, in particular, sub-section (1)(a) a wider and liberal interpretation to include purchasers of land, company owners, chargees, tenants and even an option holder – see *Macon Engineers Sdn. Bhd. v. Goh Hooi Yen* [1976] 2 MLJ 53; *Macon Works & Trading Sdn. Bhd. v. Phang Hon Chin* [1976] 2 MLJ 177; *Karuppiah Chettiar v. Subramaniam* [1971] 17 MLJ 209 and *Sing Lian Express Sdn. Bhd. v. Soh Kim Tee* [1974] 2 MLJ 24. The rationale behind these interpretations on the caveatee's interest was stated by Hashim Yeop Sani J (as he then was) in *Macon Works* case *(supra)* [1976] 2 MLJ at p. 182 as follows:
>
> > It is of interest to note that in this case a caveat in existence in respect of the said land and no action has been taken by the defendants for an order to remove the caveat on the grounds that the plaintiff has no interest in the terms of the Land Code 1965 for capacity to lodge the caveat. It has been well established that as far as our Land Code is concerned the whole system of caveat is founded on the principle that they exist for the protection of alleged as well as proved interest and therefore not only is a person who has a right to a registrable interest in land who may enter a caveat but also any person claiming title to it or any registrable interest in any alienated land or even claiming only a right to such title or registrable interest may enter a caveat – see

Mahandevan & Anor. v. Patel, also *Jit Kaur v. Parl Singh, Nanyang Development (1966) Sdn. Bhd. v. How Swee Poh and Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh*.

According to Mr. Balbir Singh the word "tenant" in the NLC means someone holding a tenancy for a period of three (3) years or less. And he then concluded that the defendants were reasonable in thinking that based on the case of *Inter-Continental Mining Co. Sdn Bhd v. Societe Des Etains De Bayas Tudjuh (supra)* that they were entitled to file a private caveat. But the case of *Inter-Continental Mining Co Sdn Bhd (supra)* was a case that dealt with a contractual licence for a period of three (3) years. At p. 149 of the report, Gill FJ (as he then was) had this to say:

> From what I have just said it follows that if the agreement in the present case is taken as a permit or licence to the appellants to enter the land and mine it, and in view of the fact that the appellants relying on that agreement entered into occupation of the land and spent large sums of money to commence mining operations, equity will protect their rights under the agreement and hold that the respondents are holding the land comprised in the mining lease in trust for the appellants to permit the appellants to mine it for the duration of the permit. Thus, the appellants were also entitled to lodge a caveat under section 323(1)(b) of the National Land Code.

It must be borne in mind that in both these two cases – referring to *J. Raju M. Kerpaya v. Kwong Yik Bank Berhad & Anor (supra)* and the case of *Inter-Continental Mining Co. Sdn Bhd (supra),* the courts were not dealing with the question as to whether the option period in a tenancy should be taken into account in computing the duration of a tenancy. These two cases have no co-relation nor have they anything to do with the defendants' action in filing the private caveat. Put in another way, it would be wrong to say that because of these two cases the defendants were motivated to file the private caveat against the said property. That would be going too far. The defendants' basis for filing the private caveat was concisely stated by Gopal Sri Ram JCA in his judgment in *Luggage Distributors (M) Sdn Bhd (supra)* at p. 731:

> (1) The pivotal part of the respondents' case lies in the exercise by them of the option on 4 January 1994. It is the exercise of the option that led to the entry of the caveat.

His Lordship Gopal Sri Ram JCA continued to say further at the same p. the following words:

(3) By the exercise of the option, the respondents enlarged their interest in the land and had in consequence become lessees, entitled to registration of their lease. In other words, the exercise of the option converted the respondents from exempted tenants to lessees.

Indeed that this was the true basis for the lodgment of the private caveat was disclosed in the affidavit of the first defendant – Tan Hor Teng @ Tan Tien Chi, that was affirmed on 6 December 1995 as seen in encl. 11. In that affidavit, the first defendant deposed as follows:

8. Thereafter, an exchange of correspondence culminated in Messrs. Lee Ong & Kandiah (formerly known as Lee Azmi Ho Tan & Kandiah) ('LOK') the solicitors for the Landlord unequivocally informing the plaintiff that we had duly exercised our option to extend our tenancy for a further period of two (2) years *vide* their letter dated 5th January, 1994. Now shown to us and marked as bundle 'T3' are the 3 letters respectively dated 31st December, 1993 and 4th January, 1994 and 4th January, 1994 from KYT (referring to Messrs. K.Y. Thong & Co.) and letters dated 4th January, 1994 and 5th January, 1994 from LOK.

9. Whereupon we lodged a caveat Presentation No: 329/94 Jilid 250 Folio 155 on the grounds that our tenancy now exceeded a three year period and now was registrable as a lease.

And I have this to say. There was no evidence whatsoever that the defendants had lodged the private caveat on any other grounds. The averments of the first defendant in encl. 11 as reproduced above were the only grounds which the defendants were relying upon when they lodged that private caveat on the property. That being the case, I am of the considered view that to enable the defendants to succeed on their submissions on this ground, the defendants must show that the state of the law at the time the private caveat was lodged at the very least support their contention that the option period when exercised ought to be included in the computation of the tenancy. But, alas the defendants have failed to show this. In fact, I would go so far as to say that the defendants could not show this at all. In this connection, the state of the law has always been well settled. In the words of Gopal Sri Ram JCA in the case of *Luggage Distributors (M) Sdn Bhd (supra)* at p. 738 of the report:

> In my judgment, the effect of the exercise of an option is to create a fresh term taking effect from the end of the previous term. That this has always been the law is demonstrated by the decision of the High Court of Australia in *Gerraty v. McGavin* [1914] 18 CLR 152 at page 163, which I drew to the attention of counsel during argument. *Lewis v. Stephenson* [1898] 67 LJQB 296 also supports this proposition.

Furthermore, as a tenant exempt from registration under our NLC, the defendants' interest was capable of being adequately protected by means of an endorsement on the register document of title under s. 316(1) of the NLC. In *Than Kok Leong v. Low Kim Hai* [1983] 1 CLJ 95; [1983] CLJ (Rep) 907, Mohamed Dzaiddin JC (as he then was) was of the view that a tenant exempt from registration will have no protection against the new landlord if the said tenancy was not endorsed on the document of title and, consequently, his Lordship held that the new landlord notwithstanding the notice of an existing tenancy could still give a notice of eviction to the tenant subsequent to his purchase of the property.

In my judgment, on the facts as presented itself before me, I must hold that the defendants had no reasonable cause to believe that they were entitled to any caveatable interest to the property at all.

(b) It Would Be Sufficient For The Plaintiff To Show That The Private Caveat Filed By The Defendants Was "Wrongfully" Entered

Mr. Ong Chee Kwan, the learned counsel for the plaintiff rightly submitted that under s. 329(1) of the NLC it was sufficient for the plaintiff to show that the defendants when filing their private caveat had "wrongfully" done so. I have reproduced s. 329(1) of the NLC in the early part of this judgment. It must be recalled that s. 329(1) of the NLC uses the phrase "wrongfully or without reasonable cause". The word "or" suggests that the requirements of "wrongfully" and "without reasonable cause" ought to be read disjunctively. In ordinary usage, the word "or" has always been construed in its disjunctive form. It is disjunctive and cannot be conjunctive (*Uddin v. Associated Portland Cement Manufacturers, Ltd* [1965] 2 QB 582; and *R. v. Surrey Quarter Sessions, ex p. Commissioner of Metropolitan Police* [1963] 1 QB 990). Using this approach, the plaintiff is entitled to succeed if it can show that the defendants' private caveat had been lodged "wrongfully". There is no necessity for the plaintiff to show that the private caveat was lodged by the defendants "without reasonable cause". The learned counsel for the defendants cited the case of *Commonwealth Bank of Australia v. Baranyay* [1993] 1 VR 589, a decision from the Supreme Court of Victoria by Hayne J. But that case revolved on the interpretation of s. 118 of the Australian Transfer of Land Act 1958 (No: 6399) which is worded differently from our NLC. That s. 118 of the Australian Transfer of Land Act 1958 (No: 6399) does not employ the word "wrongfully" like our s. 329(1) of the NLC. At p. 600 of the report, his Lordship Hayne J reproduced in verbatim s. 118 of the Australian Transfer of Land Act 1958 (No: 6399), and I need only to reproduce it here and I will do so accordingly:

118. Any person lodging with the Registrar without reasonable cause any caveat under this Act shall be liable to make to any person who sustains damage thereby such compensation as the Court deems just and orders.

Thus, for this very reason, the reliance placed on that Australian case was certainly misplaced. I did say that Selvam JC in *Tan Soo Leng David v. Wee, Saktu & Kumar Pte Ltd & Anor (supra)* interpreted the word "wrongfully" to mean "without legal right", and it can certainly be said of the defendants here that they had no "legal right" to lodge that private caveat. Furthermore, based on the decision of the Court of Appeal in *Luggage Distributors (M) Sdn Bhd (supra),* I must hold that the defendants' private caveat was wrongfully entered because they never had any caveatable interest in the first place.

The present plaintiff was not a party in *Luggage Distributors (M) Sdn Bhd (supra)* but that would not pose a problem at all. Under s. 329(1) of the NLC "any person," "who thereby suffers any damage or loss" can make a claim for compensation. It is not confined to the person who applied for the removal of the private caveat. It must be borne in mind that a private caveat may affect more than one party and it is not the case that all the affected parties need to go to court to apply for the removal of the private caveat. In my judgment, it is sufficient if one of the affected parties proceed to court to seek removal of the private caveat and the rest can take advantage of the decision of the court when the private caveat has been ordered to be removed. To hold otherwise would certainly be perverse in the extreme. Here, it was *Luggage Distributors (M) Sdn Bhd* who sought for the removal of the private caveat lodged by the defendants. And now the present plaintiff is taking advantage of it and is now proceeding against the defendants. In my judgment, the plaintiff is entitled to do that.

(c) Plaintiff Was The Author Of Its Own Loss

It was submitted on behalf of the defendants that the plaintiff was the author of its own loss and by reason thereof the defendants cannot be made liable to the plaintiff. The defendants laid emphasis to the plaintiff's threats to evict the defendants as tenants notwithstanding the terms of the sale and purchase agreement which expressly made the sale subject to the tenancy. But, with respect, it must be borne in mind that on the strength of the case of *Than Kok Leong v. Low Kim Hai (supra),* the present plaintiff was entitled in law to evict the defendants because the plaintiff is not bound by the tenancy agreement since it was not endorsed. Even assuming that the present plaintiff had no legal right to evict the present defendants, the facts as alluded to earlier showed that the present plaintiff had, in fact, done nothing further than stating in its letter through its then solicitors dated 22 December 1993 to the effect that "… our clients have expressed their intention to take possession of the

subject property upon completion since your clients' right is no where enshrined in the tenancy agreement." But the present plaintiff did not take any steps to evict the present defendants at all. Put it differently, no steps were ever taken to evict the present defendants.

Of pertinence would be this. The proximate cause for the plaintiff's loss was not due to the letter dated 22 December 1993 but rather because of the defendants' wrongful act in filing the private caveat. If the defendants were of the view that they were entitled to quiet possession of the ground floor of the shophouse then the proper course for the defendants to take would be to apply for an injunction to restrain any act to evict them. This course of action was not undertaken by the defendants. Instead, the defendants chose to file a private caveat on the property knowing fully well that the lodgment of such a caveat would effectively frustrate the purchase of the property by the plaintiff. The defendants simply refused to withdraw the private caveat despite repeated requests to do so. From this refusal, the plaintiff's loss started to flow. Seen from this perspective, the maxim that "no man shall take advantage of his own wrong" would not apply to the present case. On the contrary, the defendants ought not to be allowed to avoid their own wrongful act. This is my judgment and I so hold accordingly.

(d) An Allegation Of Conspiracy To Defraud The Defendants

The learned counsel for the defendants drew my attention to the letter dated 24 August 1994 from Messrs. Darshan Chong & Co. to Messrs. Lee Ong & Kandiah as seen in encl. 2 of exh. "G", particularly to the following passages:

> Further as our client do not want the appeal and the claim for damages to be prejudiced in any way, our client would be obliged if your client could inform all the tenants presently at the premises to pay all rentals from the 24.8.94 to your firm and upon receipt your firm to pay our client all the rentals paid to your firm. We would also be obliged if you could kindly arrange to forward to us all rental deposit(s) paid to your clients by the tenant.

> Further you or your clients are not to inform Tomlinson Antique House or any other tenants that the full purchase price has been paid as our client's intention is to claim damage(s) up until the appeal is concluded.

The learned counsel for the defendants also drew my attention to the affidavit in encl. 2 at para. 17 where it was stated that the balance of the purchase price was paid on 24 November 1994 and para. 17 of encl. 2 also alluded to exh. "G" which was annexed thereto but that exh. "G" showed that the balance of the purchase price was paid on 24 August 1993.

The learned counsel for the defendants then argued that there was conspiracy to defraud the defendants by relying on the above points.

With respect, I beg to disagree. Firstly, even if the argument of an alleged conspiracy was indeed true (which was not the case here), that cannot in any way defeat the plaintiff's claim under s. 329(1) of the NLC. It would be more appropriate and apt if this point were to be dealt with during the assessment of the damages. Secondly, Mr. Ong Chee Kwan for the plaintiff pointed out that it is true that the balance of the purchase price was only paid on 24 August 1993. And he proceeded to say that that was the reason why the plaintiff's claim for interest only came up to 24 August 1993 and not beyond that. And he said that this is clearly set out in para. 20(ii) of the affidavit in encl. 2. And he too said that this is notwithstanding the fact that Messrs. Darshan Chong & Co in their letter dated 24 August 1993 had requested Messrs. Lee Ong & Kandiah not to inform the defendants in regard to the completion date in order to enable them to claim interests for a further period of time. Indeed these were salient submissions that should be adopted favourably for the plaintiff. It must be borne in mind that the plaintiff in this action was not claiming against the defendants anything more than what it was legally entitled to claim. The plaintiff had not inflated its claim at all. At any rate, the defendants were at liberty to challenge the quantum at the hearing of the assessment for damages.

To say as was said by the defendants that there is a triable issue in regard to the issue of quantum as claimed by the plaintiff was certainly untenable. The Court of Appeal in *Luggage Distributors (M) Sdn Bhd (supra)* was very decisive in its decision and I am bound by it. To me, the issue on quantum can only be raised at the hearing of the assessment and not at this stage.

In regard to the issue of the legal costs paid by the plaintiff for the proceedings taken by Luggage, I would agree with the submission of Mr. Ong Chee Kwan that they were and constituted the actual amounts that were paid. The High Court in *Mawar Biru Sdn Bhd v. Lim Kai Chew* [1992] 1 MLJ 336 held that the party claiming under s. 329(1) of the NLC was entitled to claim for the actual loss suffered. The same would also be true for the present plaintiff. The fact that the present plaintiff had paid the costs and not Luggage can never be denied. Luggage, however, cannot claim against the defendants under s. 329(1) of the NLC because the costs were actually incurred by the present plaintiff. At any rate, the defendants have not been put in any worse off position. I venture to say that this head relates more to quantum and not in regard to liability and therefore it cannot defeat the plaintiff's claim for summary judgment. In *Lo Foi v. Lee Ah Hong @ Lee Lum Sow & Ors* [1997] MLJU 310, I had this to say:

The object of compensatory damages is to give the successful litigant, compensation for the damage, loss or injury which he has suffered: *General Tire and Rubber Co. v. Firestone Tyre and Rubber Co. Ltd* [1975] 2 All ER 173. On the other hand, exemplary or punitive damages are usually awarded to punish a defendant where his conduct is said to be sufficiently outrageous to merit punishment. An example would be where there is malice, fraud, cruelty, insolence or the like. Section 329 (1) of NLC clearly enacts that any damages awarded thereto are merely to compensate the aggrieved party. There was no evidence of malice on the part of the plaintiff. For fear of repetition, the order of the High Court ordering that the private caveat should remain pending the disposal of the suit clearly showed that the plaintiff had, all along, a caveatable interest. For this reason, exemplary or punitive damages should not be awarded against the plaintiff.

Hollebone v. Midhurst and Fernhurst Builders [1968] 1 Lloyd's Rep. 38 lays down a classic proposition to the effect that the normal measure of damages is based, invariably, on the dimunition of the value of the land. This too should be considered and unfortunately there was no evidence at all as to the dimunitive value of the said property. At any rate, in assessing damages, relevant considerations to be taken into account must necessarily include two aspects:

(1) Remoteness of the damages; and

(2) Mitigation of the damages.

Remoteness of the damages

It is now trite law that compensation can only be awarded for damages which is foreseeable. It must be borne in mind that damages per se cannot be ordered for all the direct consequences of a wrongful act. The 'direct consequences' approach expounded in *Re Polemis* [1921] 3 KB 560 was overruled by the Judicial Committee of the Privy Council in *Overseas Tankships (UK) Ltd v. Morts Dock and Engineering Co. Ltd (The Wagon Mound)* [1961] AC 388 in favour of the now famous 'foreseeable damage' approach. Lord Wright observed in *Owners of Dredger Liesbosch v. Owners of Steamship Edison* [1933] AC 449 especially at page 460:

> The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes,' or consequences of consequences'.

And further down the same page, I had this to say:

> In my judgment, damages under section 329 (1) of the NLC must be assessed in accordance with the principles of the law of torts – that would be the 'reasonable foreseeability test'.

I have no hesitation to apply the "reasonable foreseeability test" in the present case. Thus, it is a correct proposition to say that it is foreseeable that when a private caveat is wrongfully entered and when the defendants refuse to remove the same, legal costs would be incurred in making an application to the court to remove that private caveat.

In regard to the defendants' counterclaim and other losses that were unrelated to the plaintiff's claim, I made a ruling that these matters should be determined separately. In my judgment, on the facts, the plaintiff should not be prevented from obtaining summary judgment (*Yeo Hiap Seng v. Australian Food Corp Pte Ltd & Anor* [1991] 3 MLJ 144; and *Highceed Corp Sdn Bhd v. Warisan Harta Sabah Sdn Bhd & Anor* [2000] 5 MLJ 337).

Conclusion

For the reasons as adumbrated above, I dismissed forthwith the defendants' appeal in encl. 32 with costs.